

Monthly information

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Lösungen für deine Steuern

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Hello,

The Federal Fiscal Court (Bundesfinanzhof) commented on the question of the realization of the facts of the type of income "rental and leasing" of a quota usufruct by way of gift and limited in time, which a plaintiff agreed with his son of full age for his share in a real estate company. The question was whether the usufructuary had a position like that of a shareholder under the terms of the agreement and how it was actually handled.

In other recent rulings, the Federal Fiscal Court commented on the taxation of stock options granted by a foreign employer and on the accrual and adjustment of VAT in the case of installment-based remuneration for the construction of a photovoltaic system.

The question of whether sales from the short-term rental of residential containers to harvest workers are subject to the reduced VAT rate, even if they are not living and sleeping quarters in a building, was also clarified by the Federal Fiscal Court.

In addition, according to the Federal Ministry of Finance, as of April 1, 2023, the amended program schedules for the 2023 payroll tax deduction will be applied and wage increases for employees in various industries will take effect.

Do you have questions about the articles in this issue of Monthly Information or about other topics?

Please contact us. We will be happy to advise you.

Income tax

Renting and leasing – the attribution of income in the case of quota usufruct of a share in a company

By granting the usufruct of a share in a partnership managing assets, the usufructuary - instead of the partner - generates the income from renting and leasing attributable to the share if and to the extent that he is in principle able to participate in the company's basic transactions due to the voting and management rights contractually granted to him.

According to a ruling by the German Federal Fiscal Court, the same applies to the quota usufruct of a company share. The quota usufructuary only generates the income from rental and leasing attributable to the share if the contractual provisions on the appointment of the quota usufruct ensure that the shareholder cannot make the decisions - including those relating to the foundations of the company - alone and/or against the will of the quota usufructuary.

Note

According to the Federal Fiscal Court, contractual provisions are probably harmful which, beyond the scope of application of Section 1071 (2) of the German Civil Code (BGB), grant the shareholder the right to participate without having to take the usufructuary into account.

Taxation of Stock Options from Foreign Employers in Case of a Change of Residence

If an employee is granted stock options within the scope of his employment relationship, the resulting non-cash benefits will only accrue at the time the option is exercised. The non-cash benefits from the exercise of stock options are granted on a time-period basis - irrespective of taxation at the time the option is exercised - and are therefore to be allocated proportionately to the vesting period. According to the inducement principle, the period between the granting of the stock options and their first exercisability is relevant.

However, a conclusive assessment can only be made based on the specific agreements made when the stock options were granted and the other circumstances of the individual case.

According to the Federal Fiscal Court, in cross-border situations, any exemption of income under treaty law

is based on the activity in the vesting period. As far as the double taxation agreement with the USA (DBA-USA 1989/2008) is linked to a "person resident in a contracting state", only the residence at the time of the inflow of the income is decisive.

Accrual of bonus interest from a building savings contract with only book entry of interest on the bonus account

Bonus interest from a home savings contract does not accrue to a taxpayer as early as the annual statement of interest on a bonus account maintained by the home savings bank if an entitlement to the bonus interest only arises after a waiver of the home savings loan, the bonus interest is only due upon disbursement of the home savings balance, and it can only be disposed of in connection with the home savings balance. This was the decision of the Federal Fiscal Court.

Accordingly, the Tax Court correctly ruled that the tax office was entitled to subject the bonus interest in the year in dispute to taxation in full. In the case in dispute, the bonus interest credited by the building society was an increase in the credit interest granted to the plaintiff for the transfer of the building society credit. The bonus interest, therefore, constituted - just like the credit interest - remuneration for the transfer of capital assets for use. The situation is not different because, in the case of a building savings contract, savings are generally only a transitory stage on the way to obtaining a building savings loan. This does not exclude the possibility that, in individual cases, the purpose of the savings may be (partly) decisive for the conclusion of a building savings contract. This applies in any case if the expectation of a return from the building savings credit is in the foreground. It is sufficient if the intention to generate income from capital assets is only pursued as a secondary purpose.

Sale of a department store after facade renovation not commercial property trading

Without a sustainable activity, commercial real estate trading does not exist if only a property (in this case a retail department store) is acquired, the facade is renovated and subsequently sold. According to a ruling by the Hamburg Fiscal Court, this applies in any case if the taxpayer does not develop any activities in the context of the facade renovation that go beyond what is required for the construction of any building in terms of scope and weight.

Note

For an assessment of the correct distinction between private asset management and commercial real estate trading, reference is made to the Income Tax Notes 2020, Annex 17 (Federal Ministry of Finance of March 26, 2004).

Calculation of depreciation: Remaining useful life of a rental property according to the Real Estate Value Ordinance

Valuation reports obtained by a taxpayer in which the remaining useful lives of rental properties are calculated in accordance with the German Real Estate Valuation Ordinance (ImmoWertV) can be used as the basis for determining depreciation for wear and tear (AfA). This was the decision of the Münster Fiscal Court.

According to the principles of the German Federal Fiscal Court ruling, taxpayers have the option of being satisfied with the standardized depreciation rates or of claiming and demonstrating an actual shorter useful life. It is not necessary to be certain of a shorter actual useful life. Rather, at most the highest possible probability can be required, so that an estimate by the taxpayer is only to be rejected if it clearly lies outside the reasonable range of estimation. In this case, the procedure for determining the real value of a building in accordance with the ImmoWertV can be applied, even if this represents a model calculation that is not primarily aimed at determining the actual useful life in accordance with the Income Tax Act. Based on these principles, residual useful lives determined based on submitted expert opinions are therefore not objectionable.

Silent partnership in the company of the employer - income from capital assets or from non-independent work?

A silent partner who participates in the profits and losses of the company is not to be regarded as a co-entrepreneur if he has no share in the value of the company or in the increase in the hidden reserves of the business assets, including goodwill, and if he also has no voting rights or rights of objection beyond the right to inspect the annual financial statements, including the auditor's audit reports. This was the decision of the Baden-Württemberg Tax Court.

The fact that the employee does not have a contractual right to the granting of the silent partnership is evidence of a special legal relationship that exists

independently of the employment relationship. The possibility of making the silent partnership contribution by means of retained earnings is a common way of making the contribution.

The fact that the employee's profit participation from the silent partnership is not limited to a certain - absolute and appropriate - percentage of the contribution cannot be used to infer that the silent partnership was prompted by the employment relationship.

The profit shares from the silent partnership in the GmbH do not lead to income from employment for the plaintiff but to income from capital assets.

Sales tax

Construction of a photovoltaic system: tax accrual and adjustment in the event of subsequent receipt of the payment

The Federal Fiscal Court had to clarify, among other things, the question of whether, regarding a due



date agreement according to which the agreed remuneration is only due for payment to the extent that it can be settled from the current income of the customer's electricity feed-in, the entrepreneur is already entitled to adjust the tax calculated according to agreed charges for the taxation period in which the tax arose.

The tax also arises with the performance of the service, without a tax adjustment, if the entrepreneur agrees with the operator of a photovoltaic system that the remuneration for this is only owed to the extent that it can be settled by income from the electricity feed-in. In this case, the plaintiff is not entitled to adjust the tax for the respective partial performance to the extent of the respective difference between the agreed remuneration and the remuneration received.

Reduced sales tax for renting out non-stationary residential containers to employees

The Federal Fiscal Court (Bundesfinanzhof) has clarified that not only the renting out of land and buildings permanently connected to it is favored under the Value Added Tax Act, but also in general the renting out of living and sleeping quarters by an entrepreneur for the short-term accommodation of strangers and

thus also the renting out of residential containers to harvest workers.

This is also in line with the Union law. The list of supplies of goods and services to which reduced VAT rates may be applied includes accommodation in hotels and similar establishments, including accommodation in vacation accommodation, and the rental of camping sites and sites for the parking of caravans. Accommodation in vacation accommodation" also includes the rental of tents, caravans or mobile homes pitched on campsites and used as accommodation.

Use of a newly acquired passenger car partly for taxable and partly for tax-exempt transactions - input tax allocation not according to sales key

If, after the acquisition, a passenger car is used partly to generate taxable and partly to generate tax-exempt sales, the input tax for the passenger car is to be apportioned based on the mileage of the passenger car. According to the Tax Court of Baden-Württemberg, an apportionment in the ratio of the mileage attributable to the taxable and tax-exempt sales leads to a more precise economic allocation. Baden-Württemberg, an apportionment based on the ratio of the taxable and tax-exempt mileage leads to a more precise economic allocation than the sales key.

If an entrepreneur acquired the new passenger car shortly before the end of the year (in this case: November) and had previously used another "functionally identical" passenger car for the same transactions in the year of acquisition of the passenger car, the actual use of both the old and the new passenger car in the entire calendar year and thus the total mileage in the entire calendar year must be taken into account for the input tax allocation.

If the newly acquired passenger car is used for taxable or tax-exempt transactions from the time of acquisition until the end of the year to a different extent than determined in the input tax allocation at the time of purchase based on the total mileage for the calendar year, an input tax adjustment must be made in this respect. In any case, in cases where an already existing asset is replaced by an asset with the same function, the application of the exclusion of input tax deduction and the adjustment of the input tax deduction may occur in parallel.

Corporate income tax

Actual implementation of a profit and loss transfer agreement - recognition of a fiscal unity under corporate income tax law

If the profit and loss transfer agreement is not executed during the minimum term of five years, this not only leads to an interruption of the consolidated tax group under corporate income tax law for individual assessment periods but also to an overall (retroactive) non-recognition of the consolidated tax group under corporate income tax law.

According to a ruling of the German Federal Fiscal Court, the actual implementation of the profit and loss transfer and control agreement requires that it be executed in accordance with the contractual agreements. This means, among other things, that the profits determined in accordance with generally accepted accounting principles are transferred to the controlling company by payment or offsetting. "Offsetting" in this context is to be understood as meaning that it must be an offsetting equivalent to an actual payment; the mere booking of the receivable without a settlement effect, on the other hand, is not sufficient.

Tax contribution account: Shareholder has no right to challenge

The Corporate Income Tax Act stipulates that the existence of the tax contribution account must be established by means of special notice. In particular, the contributions made by the shareholder to "his" corporation must be recorded in the account. If such contributions are later repaid to the shareholder from the contribution account, then the shareholder does not have to pay tax on this so-called return of contributions. Although the notice is therefore essentially relevant for the taxation of the shareholder, the notice is directed exclusively at the corporation.

The Federal Fiscal Court has confirmed this view. In principle, an assessment can only be challenged by the addressees. In the case of the notice under the German Corporate Income Tax Act, this is the corporation, and it alone can therefore lodge an objection and take legal action. The shareholder of the corporation is not the addressee, but as a third party is only indirectly affected by the notice. The shareholder's own right of appeal (so-called third-party right of appeal) is also not to be recognized as an exception. On the one hand, there is no gap in legal protection, as the corporation can assert errors in the notice in appeal proceedings. On the other hand, such a right has the

consequence that the decision can still be challenged by the shareholder after many years and that there is no lasting legal peace. The denial of the shareholder's own right of appeal is also compatible with the Basic Law's guarantee of legal protection (Article 19 (4) GG).

Other

Change in income tax deduction: Employees can expect more net pay

According to the Federal Ministry of Finance, the amended program schedules for payroll tax deduction 2023 will be applied from 01.04.2023. This will consider "the increase in the employee lump sum to 1,230 euros and the relief amount for single parents to 4,260 euros by the Annual Tax Act 2022". For salaried employees or civil servants, among others, this means that they can also expect a higher net salary in their account because of the higher tax allowances.

Wage increases for employees in various industries

Employees in the **main construction sector** - building, civil engineering and road construction - who are covered by collective agreements can look forward to a pay rise from **April 1, 2023**. In the west by 2 percent and in the east by 2.7 percent. A one-off payment of 450 euros is also due in May.

The industry-related minimum wage for **painters and varnishers will** rise from 13.80 to 14.50 euros from 01.04.2023. For helpers, the minimum wage will then be 12.50 euros; this is an increase of 1.10 euros per hour.

The collectively agreed minimum wage for **temporary employees will** be at least 13 euros per hour from 01.04.2023. The hourly rates are based on the respective pay group. IG Metall provides an overview of all pay groups.

The federal government agrees on a new funding concept for renewable heating

On April 19, 2023, the German government agreed on a new funding concept for renewable heating. The bill to amend the Building Energy Act will enshrine the mandatory switch to renewable energies for heating in law. In concrete terms, this means that from 01.01.2024, as far as possible, every newly installed heating system must be powered by at least 65% renewable energy. The subsidies will therefore also be adjusted as a result.

The Building Energy Act will now be forwarded to the Bundestag and Bundesrat.

Caution with renovation measures

Legislators are attempting to promote energy-efficient building refurbishment as an important component of the energy transition. In the process, one aspect has obviously been overlooked that can severely hamper these efforts. According to the expert company Richardson in Witten, the issue of asbestos will become dramatically more important soon. It is not known how many homes and buildings built before the ban in 1993 contain asbestos. However, the proportion is likely to be considerable.

Since asbestos fibers can be released during energy-related renovation work, statutory protective measures take effect, which can lead to considerable cost increases.

Note

Before an energetic building refurbishment is realized, an asbestos test should be commissioned in advance by an expert for the affected objects.

Dates Taxes/Social Security

May/June 2023

Control type		Maturity	
Wage tax, church tax, solidarity surcharge		10.05.2023 ¹	12.06.2023 ¹
Income tax, church tax, solidarity surcharge		not applicable	12.06.2023
Corporate income tax, solidarity surcharge		not applicable	12.06.2023
Sales tax		10.05.2023 ²	12.06.2023 ³
End of grace period of above tax types when paid by:	Bank transfer ⁴	15.05.2023	15.06.2023
	Check ⁵	10.05.2023	12.06.2023
Trade tax		15.05.2023	not applicable
Property tax		15.05.2023	not applicable
End of grace period of above tax types when paid by:	Bank transfer ⁴	19.05.2023	not applicable
	Check ⁵	15.05.2023	not applicable
Social security ⁶		26.05.2023	28.06.2023
Capital gains tax, solidarity surcharge		The capital gains tax and the solidarity surcharge on it must be paid to the responsible tax office at the same time as a profit distribution is made to the shareholder.	

- 1 For the past month.
- 2 For the past month, for the penultimate month in the case of a permanent extension, for the past calendar quarter in the case of quarterly payers with a permanent extension.
- 3 For the past month, in the case of permanent extension for the penultimate month.
- 4 As a rule, advance VAT returns and wage tax returns must be submitted (electronically) by the 10th of the month following the filing period. If the 10th falls on a Saturday, Sunday or public holiday, the next working day is the deadline. No late fees will be charged if payment is up to three days late. A remittance must be made early enough so that the value date on the tax office's account is the same as the due date.
- 5 If payment is made by check, it should be noted that payment is not considered made until three days after the check is received by the tax office. A direct debit authorization should be issued instead.
- 6 Social security contributions are uniformly due on the third last bank working day of the current month. In order to avoid late payment penalties, the direct debit procedure is recommended. All health insurance funds have a uniform deadline for the submission of contribution statements. These must be received by the respective collection agency no later than two working days before the due date (i.e. on 24.05.2023/26.06.2023, 0:00 hours in each case). Regional peculiarities with regard to the due dates may have to be taken into account. If payroll accounting is performed by external agents, the payroll data should be transmitted to the agent approximately ten days before the due date. This applies in particular if the due date falls on a Monday or on a day after a public holiday.

Imprint

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